

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANTHONY A . BEARD,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner of
Social Security,

Defendant.

CASE NO. C07-5187 FDB

ORDER ADOPTING REPORT
AND RECOMMENDATION
GRANTING DEFENDANT'S
MOTION TO DISMISS

This matter comes before the Court on the Report and Recommendation of the Magistrate Judge that Defendant's motion to dismiss Plaintiff's complaint for judicial review of denial of disability benefits on the basis of lack of jurisdiction be granted. Plaintiff has filed Objection to the Report and Recommendation asserting (1) that Plaintiff's request for review was timely filed, (2) Plaintiff had good cause for late filing, (3) the Commissioner's actions equitably tolled the limitations period, and (4) the Court has jurisdiction to review Plaintiff's constitutional challenges. The Court is unpersuaded by Plaintiff's arguments and adopts the Report and Recommendation of the Magistrate Judge.

As detailed by the Magistrate Judge, a request for judicial review of the denial of an application for disability benefits must be made within sixty days after the mailing to the applicant of notice of the Commissioner's final decision to deny the application. The date of receipt of the notice of the decision is presumed to be five days after the date of such notice of decision. In the instant action, wherein the Appeals Counsel denied a request for an extension of time to file a request for review, the final decision is the decision of the administrative law judge (ALJ). The Plaintiff's request for judicial review of the ALJ's decision was not timely filed.


1 Plaintiff argues that equitable tolling should be applied or the time constraints deemed waived by
2 the actions of the Commissioner. Assuming that Plaintiff did not receive the November 20, 2000 ALJ
3 notice of decision denying disability benefits, there was also March 31, 2004 notice to claimant of
4 termination of benefits and November 19, 2004, new claim for disability benefits that was not appealed.
5 Any possible equitable tolling or waiver of the time limitations cannot be construed to extend into 2007
6 when Plaintiff filed the instant complaint in this Court.

7 Finally, Plaintiff's due process argument is without merit. As outlined by the Magistrate Judge,
8 Plaintiff was afforded a meaningful and ample opportunity to be heard in the ALJ proceedings and before
9 the Appeals Council in his request for an extension of time to file a request for review.

10 The Court, having reviewed Defendant's Motion to Dismiss, Plaintiff's Response, the Report and
11 Recommendation of United States Magistrate Judge Karen L. Strombom, Objection to the Report and
12 Recommendation, and the remaining record, does hereby find and ORDER:

- 13 (1) The Court adopts the Report and Recommendation;
- 14 (2) The Court lacks subject matter jurisdiction over this matter as described in the Report and
15 Recommendation;
- 16 (3) Defendant's Motion to Dismiss is **GRANTED**; and
- 17 (4) The Clerk is directed to send copies of this Order to Plaintiff's counsel, Defendant's counsel
18 and Magistrate Judge Karen L. Strombom.

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20 DATED this 2nd day of January, 2008.

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23 FRANKLIN D. BURGESS
24 UNITED STATES DISTRICT JUDGE
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